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Nos. 08-1553 & 08-1554 (Consolidated)

In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER UNION PACIFIC RAILROAD CO.

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QUESTION PRESENTED

The Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes) ("COGSA"), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to extend the terms of such maritime contracts to the entire carriage—including any inland leg of the journey and any downstream carrier. *See Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), supplies the default liability regime for most rail and motor carrier transportation within the United States. Other provisions of the ICA authorize carriers to contract out of Carmack's default rules. *See* 49 U.S.C. §10709. The question presented is:

Whether the Ninth Circuit must be reversed because it erroneously held, in conflict with four other circuits, that the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a "through" bill of lading, and also erred by holding that carriers providing exempt transportation cannot contract out of Carmack under 49 U.S.C. §10709 or by offering Carmack-compliant terms to the rail carrier's own direct customer?

LIST OF PARTIES

1. Petitioner Union Pacific Railroad Company was a defendant in the district court and an appellee in the court of appeals.

2. Petitioners Kawasaki Kisen Kaisha Ltd. and "K" Line America, Inc. were defendants in the district court and appellees in the court of appeals.

3. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co. Ltd. were plaintiffs in the district court and appeliants in the court of appeals.

RULE 29.6 STATEMENT

Union Pacific Railroad Company has no amendments to its Rule 29.6 Statement included in its petition for certiorari.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 15

ARGUMENT 20

I. THE CARMACK AMENDMENT DOES NOT APPLY TO IMPORT MOVEMENTS ON A THROUGH BILL OF LADING 20

A. The Pre-1978 Statutory Language Controls This Case 20

B. The Carmack Amendment Has Never Applied To Imports Moving Under A Through Bill Of Lading 24

C. Carmack Does Not Apply To *Any* Trade With Non-Adjacent Foreign Countries 35

TABLE OF CONTENTS—Continued

Page

D. Federal Maritime Policy And This Court's Decision In *Kirby* Strongly Support The Traditional Rule 35

II. CARMACK DOES NOT APPLY HERE BECAUSE THE PARTIES HAVE OPTED OUT OF THE ICA 39

A. Section 10709 Is Available To Carriers Providing Exempt Transportation 39

B. UP Provided Carmack-Compliant Alternative Terms To "K" Line 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

CASES

Adams Express Co. v. Croninger,
226 U.S. 491 (1913) 5

Alwine v. Pennsylvania Railroad Co.,
15 A.2d 507 (Pa. Super. Ct. 1940) 27, 28, 29, 30

Atlantic Coast Line Railroad Co. v. Riverside Mills,
219 U.S. 186 (1911) 37

Baltimore & Ohio Railroad Co. v. Montgomery & Co.,
90 S.E. 740 (Ga. Ct. App. 1916) 33

Becker & Co. v. Wabash Railroad Co.,
55 N.W.2d 776 (Mich. 1952) 29

Bills of Lading Cases,
52 I.C.C. 671 (1919) 24

Boston & Maine Railroad v. Hooker,
233 U.S. 97 (1914) 26

Burlington Northern Railroad Co. v. Oklahoma Tax Commission,
481 U.S. 454 (1987) 21

Capitol Converting Equipment, Inc. v. LEP Transport, Inc.,
965 F.2d 391 (7th Cir. 1992) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Carr v. Erie Lackawanna Railroad Co.,
85 Misc. 2d 713 (N.Y. Sup. Ct. 1972).....29

Cass v. United States,
417 U.S. 72 (1974).....22, 23

Cau v. Texas & Pacific Railroad Co.,
194 U.S. 427 (1904).....46

Condakes v. Smith,
281 F. Supp. 1014 (D. Mass. 1968).....29, 33

Consolidated Rail Corp.-Declaratory Order-Exemption,
1 I.C.C.2d 895 (1986).....42

Finley v. United States,
490 U.S. 545 (1989).....22

Florida Department of Revenue v. Piccadilly Cafeterias, Inc.,
128 S. Ct. 2326 (2008).....40

Fourco Glass Co. v. Transmirra Products Corp.,
353 U.S. 222 (1957).....22

Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury,
254 U.S. 357 (1920).....16, 25, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Goldberg v. Delaware, Lackawanna & Western Railroad Co.,
40 N.Y.S.2d 44 (N.Y. Mun. Ct. 1943) 30

Great Northern Railway Co. v. O'Connor,
232 U.S. 508 (1914) 47

Hart v. Pennsylvania Railroad Co.,
112 U.S. 331 (1884) 50

Heated Car Service Regulations,
50 I.C.C. 620 (1918) 24, 38

In re Cummins Amendment,
33 I.C.C. 682 (1915) 24

Indemnity Insurance Co. of North America v. Hanjin Shipping Co.,
348 F.3d 628 (7th Cir. 2003) 36

Keene Corp. v. United States,
508 U.S. 200 (1993) 22, 34, 35

Kenny's Automobile Parts, Inc. v. Baker,
478 F. Supp. 461 (E.D. Pa. 1979) 16, 29, 33

Knott v. Botany Mills,
179 U.S. 69 (1900) 31

Leary v. Aero Mayflower Transit Co.,
207 S.E.2d 781 (N.C. Ct. App. 1974) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Lorillard v. Pons,
434 U.S. 575, 580 (1978) 34

Missouri Pacific Railroad Co. v. Porter,
273 U.S. 341 (1927) 31

Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.,
213 F.3d 1118 (9th Cir. 2000) 12, 13

Norfolk S. Railway Co. v. James N. Kirby, Pty Ltd.,
543 U.S. 14 (2004) ..... *passim*

Porter v. Nussle,
534 U.S. 516 (2002) 40

Reider v. Thompson,
176 F.2d 13 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 113 (1950) 29, 32

Reider v. Thompson,
339 U.S. 113 (1950) 26, 32, 33, 38, 45

Shao v. Link Cargo (Taiwan),
986 F.2d 700 (4th Cir. 1993) 34

Sklaroff v. Pennsylvania Railroad Co.,
184 F.2d 575 (3d Cir. 1950) 29

Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.,
456 F.3d 54 (2d Cir. 2006) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Starrag v. Maersk, Inc.,
486 F.3d 607 (9th Cir. 2007) 10

Strachman v. Palmer,
82 F. Supp. 161 (D. Mass. 1949), *aff'd in relevant part*, 177 F.2d 427 (1st Cir. 1949) 29, 30

Swift v. Textiles, Inc. v. Watkins Motor Lines, Inc.,
799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987) 34

Tokio Marine & Fire Insurance Co. v. Amato Motors, Inc.,
996 F.2d 874 (7th Cir. 1993) 39

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers,
No. 08-604 (Dec. 8, 2009) 43

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,
515 U.S. 528 (1995) 9, 10, 37

Wachovia Bank, N.A. v. Schmidt,
546 U.S. 303 (2006) 41

Walters v. National Association of Radiation Survivors,
473 U.S. 305 (1985) 22

Whaling v. Atlas Van Lines, Inc.,
919 F. Supp. 168 (E.D. Pa. 1996) 29

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES, REGULATIONS AND LEGISLATIVE HISTORY

1 U.S.C. §1 21

1 U.S.C. §3 21

1 U.S.C. §4 21

1 U.S.C. §7 21

2 U.S.C. §285 *et seq* 21

28 U.S.C. §1254(1) 1

46 U.S.C. §30701 (Notes) ..... i, 1, 9, 10, 14

49 U.S.C. §20(11) (1976) 3, 5, 16, 20, 25

49 U.S.C. §10501(a) 6

49 U.S.C. §10502(a) 6
49 U.S.C. §10502(c) 7
49 U.S.C. §10502(d) 7, 42
49 U.S.C. §10502(e) 7, 14, 19, 41

49 U.S.C. §10709 ..... i, 7, 8, 39
49 U.S.C. §10709(a) 14, 17, 18, 40
49 U.S.C. §10709(b) 18, 40
49 U.S.C. §10709(b) 18
49 U.S.C. §10709(c)(1) 3, 40

49 U.S.C. §11706 ..... i, 1, 2

TABLE OF AUTHORITIES—Continued

Page(s)

49 U.S.C. §11706(a) 6, 18, 23
49 U.S.C. §11706(c)(1)(A) 5
49 U.S.C. §11706(c)(3)(A) 5
49 U.S.C. §11706(d)(2) 5

49 U.S.C. §11707(a)(1) (Supp. II 1979) 23

49 U.S.C. §14706 ..... i, 1, 2

Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 4

Act of June 29, 1906, ch. 3591, 34 Stat. 584 ..... 5, 27

Act of June 18, 1910, ch. 309, 36 Stat. 539 25

Act of Mar. 4, 1915, ch. 176, 38 Stat. 1196 ..... 5, 28

Act of Feb. 28, 1920, ch. 91, 41 Stat. 456 28

Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (46 U.S.C. §30701 (Notes)) 2

Pub. L. No. 94-210, 90 Stat. 31 (1976) 6

Pub. L. No. 95-473, 92 Stat. 1337 (1978) 3, 6, 21

Pub. L. No. 96-448, 94 Stat. 1895 (1980) 6, 7, 39

Pub. L. No. 104-88, 109 Stat. 803 (1995) 6

49 C.F.R. §1090.1(a)(4) 7

TABLE OF AUTHORITIES—Continued

Page(s)

49 C.F.R. §1090.2 ..... 7, 43

124 Cong. Rec. 30,172 (1978) 22

124 Cong. Rec. 31,449 (1978) 22

H.R. Rep. No. 95-1395 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009 ..... 6, 21, 22, 33

H.R. Rep. No. 96-1035 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978 8

Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14,348 (Feb. 27, 1981) 7

OTHER AUTHORITY

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 9

1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* (4th ed. 2004) 1, 9

Supreme Court Rule 15.2 44

Brief of Petitioner, *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920) (No. 1003) 27

Brief of Respondents, *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920) (No. 1003) 27

TABLE OF AUTHORITIES—Continued

Page(s)

Brief for United States as Amicus Curiae, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) (No. 02-1028) 43, 44, 48, 49

Brief for United States as Amicus Curiae Supporting Petitioner, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) (No. 02-1028) 47

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App.1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet.App.36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on February 4, 2009, and no party sought rehearing. On April 20, Justice Kennedy extended the time for filing any petition to and including June 18, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Carmack Amendment, 49 U.S.C. §§11706 and 14706, other relevant provisions of the Interstate Commerce Act (codified at Title 49), and the Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes), are reproduced at Pet.App.48a-115a.

STATEMENT OF THE CASE

Most foreign trade is transported in cargo containers that are carried both by sea on ships and by land on trains or trucks. Such "multimodal" or "intermodal" shipments now account for more than $1 trillion each year in U.S. trade. The modern industry practice is for shippers to arrange on a "through" contract basis for "'door-to-door transport'" across oceans and to inland destinations making "'efficient use of all available modes of transportation by air, water, and land.'" *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (quoting 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 589 (4th ed. 2004) ("Schoenbaum")). This Court held five years ago in *Kirby* that such through bills of lading are federal

maritime contracts, and that the downstream railroad was entitled to rely upon and enforce the liability limitations contained in the ocean carrier's bill of lading.

Just like *Kirby*, this is another "maritime case about a train wreck." 543 U.S. at 18. The cargo owners (the "shippers") arranged with an ocean carrier, "K" Line, for transportation of goods from China to various inland destinations in the United States. Consistent with the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (46 U.S.C. §30701 (Notes)), the bill of lading to which the shippers agreed limited the liability of "K" Line and any downstream carrier to $500 per package, authorized "K" Line to subcontract for inland transport "on any terms whatsoever," and provided that all disputes must be litigated in Tokyo. "K" Line contracted for rail service with petitioner Union Pacific, and the cargo allegedly was damaged when the train derailed in Oklahoma.

As in *Kirby*, the issue here is whether the carriers may enforce the terms of the maritime contracts to which the shippers agreed. The shippers argue, and the Ninth Circuit held, that the Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), makes the forum selection clause they agreed to unenforceable. This Court did not discuss Carmack or the ICA in *Kirby*, although in all relevant respects the factual posture there was indistinguishable from this case. The Ninth Circuit held, in other words, that this Court either overlooked or ignored an elephant in the room.

The Ninth Circuit is wrong. The Carmack Amendment did not apply in *Kirby*, and it does not

apply here, for several reasons. First, prior to a 1978 recodification the plain language of Carmack applied only to purely domestic interstate transportation and to transportation "from any point in the United States to a point in an adjacent foreign country," *i.e.*, exports to Canada and Mexico. 49 U.S.C. §20(11) (1976). The Ninth Circuit reads the present statutory language differently, but the 1978 codification bill expressly commands that it "may not be construed as making a substantive change in the laws replaced." *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, §3, 92 Stat. 1337, 1466. For more than 50 years prior to that recodification, the lower courts and the Interstate Commerce Commission ("ICC") consistently recognized that Carmack *did not* apply to the inland leg of import transactions like this one.

Even if Carmack would otherwise have applied here, Congress in a 1980 deregulatory bill gave shippers and rail carriers the right to opt out of the ICA (including Carmack) altogether by contracting for rail service on specified terms under 49 U.S.C. §10709. Just like the shipment in *Kirby*, the rail transport here moved as contract carriage under §10709, and the terms of that contract "may not be subsequently challenged ... in any court on the grounds that such contract violates a provision of" the ICA. 49 U.S.C. §10709(c)(1).

The Ninth Circuit held that because the Surface Transportation Board has itself deregulated intermodal transportation under 49 U.S.C. §10502, UP cannot rely on the terms of its §10709 contracts unless it can show that the shippers in China were first presented with, and rejected, Carmack-compliant alternative terms for rail transportation under 49 U.S.C. §10502(e). Section

10709 is not so constrained. Regardless, UP satisfied any obligation it might have under §10502(e) by making Carmack-compliant terms available to its actual shipping counterparty in the United States—here, "K" Line. The Ninth Circuit's holding that UP somehow must seek out "K" Line's own customers in China, in order to make sure they are aware of an alternative they plainly do not care about, is not required by the statutory text and is inefficient, unworkable, and flatly inconsistent with this Court's decision in *Kirby*.

Statutory Background

1. a. In 1887, Congress enacted the ICA and created the ICC to regulate railroad transportation. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. The ICC's jurisdiction extended to every rail carrier engaged in transportation of property or passengers between two States, to, from, and within territories, "from any place in the United States to an adjacent foreign country," and "from any place in the United States through a foreign country to any other place in the United States," as well as to shipments of property "from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." *Id.*

In 1906 Congress added the Carmack Amendment, which applied *only* to "transportation from a point in one State to a point in another State," and established a liability regime under which the first carrier (the one "receiving property for transportation" directly from the shipper) was liable for any damage occurring in the whole shipment, including on the lines of other

connecting or delivering carriers, with a right of recoupment from the carrier on whose line the damage actually occurred. Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595. (Subsequent amendments have imposed similar liability on the "delivering," or final carrier. *See* 49 U.S.C. §11706(a)). Courts have characterized Carmack as imposing on carriers "'something close to strict liability.'" *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 59 (2d Cir. 2006) (citation omitted). It essentially codified the common law rule that a carrier is liable for damage caused by the railroad and its employees, even without negligence, but not for acts of God or of a public enemy. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 506-10 (1913). The current version of Carmack preserves the parallel common law rule that the railroad's liability may be limited "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. §11706(c)(3)(A); *see also id.* §14706(c)(1)(A) (motor carriers). It also limits the venues in which a claim may be brought. *See* 49 U.S.C. §11706(d)(2).

In the 1915 Cummins Amendment, Congress extended the scope of Carmack to include "transportation ... from any point in the United States to a point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176, 38 Stat. 1196, 1197. That remained the statutory language from 1915 until 1978. *See* 49 U.S.C. §20(11) (1976).

In 1978, Congress passed a bill prepared by the Office of Law Revision Counsel in order to recodify the entire ICA and enact it into positive law. That bill expressly provided (in statutory text, not legislative

history) that the recodification was "without substantive changes," and "may not be construed as making a substantive change in the laws replaced." *See* Pub. L. No. 95-473, §3(a), 92 Stat. at 1466; *see also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018 (Congress intended to "make[] no substantive change in the law"). In an apparent attempt to streamline the phrasing, the codifiers replaced the longstanding and precise description of Carmack's scope with a reference to "transportation under this subtitle." 92 Stat. at 1453. Carmack was again reenacted in 1995 without any change to the relevant language, except that it now refers to "transportation under this part." Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. §11706(a)).

After similar amendments to simplify the language and to replace the ICC with the new Surface Transportation Board ("STB" or "Board"), the ICA's jurisdictional provision now extends to rail carriers engaged in transportation within the United States that is "between a place in ... the United States and a place in a foreign country." 49 U.S.C. §10501(a).

b. From 1976 to 1980 Congress undertook an expansive deregulation of the rail industry. The Railroad Revitalization and Regulatory Reform Act of 1976 created a mechanism through which the STB may "exempt" a carrier, class of carriers, or a particular service from some or all of the ICA's regulatory requirements. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 49 U.S.C. §10502(a)).

Four years later, Congress passed the Staggers Rail Act. Pub. L. No. 96-448, §2, 94 Stat. 1895, 1896-97

(1980) ("Staggers") (finding that "regulations affecting railroads have become unnecessary and inefficient" and "greater reliance on the marketplace is essential"). Among other things, Congress added to the exemption provision a subsection explicitly authorizing the STB "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." Staggers, §213, 94 Stat. at 1913 (codified at 49 U.S.C. §10502(f)). The Board has exercised that authority. *See* 49 C.F.R. §§1090.1(a)(4), 1090.2. The Board "may specify the period of time during which an exemption granted under this section is effective," 49 U.S.C. §10502(c), and retains the power to "revoke an exemption," *id.* §10502(d). Such "exempt" carriage thus remains subject to the Board's jurisdiction. *See* Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14,348, 14,351 (Feb. 27, 1981) ("Nothing in this exemption shall be construed to affect our jurisdiction ....").

Congress also added a provision explaining that an exemption by the STB under §10502(a) does not itself "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [the Carmack Amendment]," but also that "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the [Board] the authority to require any specific level of rates or services based upon the provisions of [Carmack]." Staggers, §213(e), 94 Stat. at 1913 (codified at 49 U.S.C. §10502(e)).

Staggers also added §10713 (Staggers §208, 94 Stat. at 1908, now codified as amended at 49 U.S.C. §10709), which permits the parties to contract for their own

deregulation of particular transportation. It applies to *all* carriage "subject to the jurisdiction of the Board" and states:

> (a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
>
> (b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.
>
> (c) (1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, *unless the parties otherwise agree.*

49 U.S.C. §10709 (emphasis added). The service provided under such contracts is therefore "exempt ... from all regulation and all of the requirements of the Interstate Commerce Act," H.R. Rep. No. 96-1035, at 100 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4132,

including Carmack's venue rules and any requirements imposed by §10502(e).

2. a. COGSA "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (citation omitted).

A bill of lading is a contract recording that a carrier has received certain goods from a shipper and establishing other conditions that "govern[] the relationship of the parties before delivery of the goods." 1 Schoenbaum, *supra*, at 621. Historically, ocean bills of lading were not uniformly enforceable in all nations. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-43 (2d ed. 1975). That "distressing lack of uniformity in shipping practice and law" prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." 1 Schoenbaum, *supra*, at 636.

The Hague Rules of 1921 established uniform international law governing the carriage of goods by sea. In 1936, Congress implemented those rules (as amended by international convention in 1924) by enacting COGSA. *Sky Reefer*, 515 U.S. at 536-37.

b. COGSA governs "[e]very bill of lading ... for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. §30701 (Notes). It guarantees shippers' rights against carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. (Notes Secs. 2-4).

By its terms, COGSA applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," the so-called

"tackle-to-tackle" period. (Notes Sec. 1(e)). But the statute also permits the carrier and shipper to agree to COGSA terms for "the entire period in which the [cargo] would be under [the shipper's] responsibility, including the period of the inland transport." *Kirby*, 543 U.S. at 29 (citing (Notes Sec. 7)). "[C]ontractual extension of COGSA is now routine in the shipping industry." *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). A so-called "clause paramount" in a bill of lading extends COGSA's liability rules beyond the tackle-to-tackle period to the cargo's final destination. A "Himalaya clause" extends the terms of the bill of lading, including the contractual extension of COGSA, to parties with whom the ocean carrier has subcontracted for inland transportation.

c. Under COGSA, the parties may agree to a liability limitation. The default (and minimum) liability cap is $500 per package. (Notes Sec. 4(5)). Shippers and carriers typically opt to retain COGSA's liability limitation; shippers pay a reduced transport rate that reflects the carriers' reduced risk, and (like the shippers in this case) obtain private insurance for the excess value of their goods. *Kirby*, 543 U.S. at 19-21 (citation omitted). COGSA otherwise forbids any clause eliminating or "lessening" the carrier's statutory liability, (Notes Sec. 3(8)), but this Court has recognized that a forum selection clause does not violate that provision. *Sky Reefer*, 515 U.S. at 535-37.

Factual Context

1. During March and April 2005, Defendant "K" Line accepted cargo shipments to be carried from Shanghai, China to various delivery points within the United States. Pet.App.2a. These shipments for "through" (door-to-door) transportation of cargo were

undertaken pursuant to multi-year contracts between "K" Line and the shippers, and under through bills of lading issued by "K" Line for the particular cargo.

The intermodal through bills of lading that govern the shipments in this case—like the vast majority of such contracts—contain both a Himalaya clause (extending the terms to any subcontractors) and a clause paramount (extending COGSA to the inland leg). Pet.App.6a & nn.4, 5. The through bills authorize "K" Line "'to sub-contract *on any terms whatsoever* Carriage ... by any of the following: (I) any Connecting Carrier ... (III) sub-contractors, ... agents and independent contractors ....'" JA-145, JA-156, JA-168, JA-180 (emphasis added). The bills of lading also include a forum selection clause like the one this Court considered in *Sky Reefer*, providing that "'any action [under the bill of lading] or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction [the shippers] irrevocably consent.'" JA-144, JA-155, JA-167, JA-179.

2. Through its American agent, "K" Line America, Inc., "K" Line contracted with UP to provide the inland rail transportation contemplated by the through bills of lading. Pet.App.4a-6a.

The "Exempt Rail Transportation Agreement" ("ERTA") to which "K" Line and UP agreed incorporated liability terms from UP's "Master Intermodal Transportation Agreement" ("MITA"). The MITA quotes UP's currently offered terms for intermodal transportation, all of which has been exempted from regulation by the STB. Pet.App.7a. The MITA explicitly invokes §10709 (the ICA opt-out provision) and offers the option of Carmack-compliant liability terms for inland domestic carriage, provided

the nature of the goods is declared to UP. Pet.App.117a. (Without such disclosure, UP would have no way to price the insurance implicit in Carmack's expansive liability regime.) Consistent with its right under the ocean bill of lading to subcontract "on any terms whatsoever," "K" Line instead elected a cheaper non-Carmack shipping option.

3. The cargo was loaded on vessels in Shanghai and Hong Kong, carried across the Pacific Ocean to Long Beach, California, and then delivered to UP to be carried by rail to its final destination. Pet.App.39a. The cargo allegedly was damaged when the train carrying it derailed in Oklahoma. Pet.App.3a.

Proceedings Below

1. a. Plaintiffs sued "K" Line, KAM, and UP in Los Angeles Superior Court. UP removed the actions to the United States District Court for the Central District of California. Pet.App.7a. Thereafter, UP and the ocean carrier defendants moved to dismiss based on the Tokyo forum selection clause in the bills of lading. Pet.App.7a-8a. Plaintiffs argued that the action was wholly governed by the Carmack Amendment, and that Carmack rendered the Tokyo forum selection clause unenforceable.

b. Relying on *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118 (9th Cir. 2000), the district court first held that the Carmack Amendment applies to "'the *inland leg* of an overseas shipment conducted under a single "through" bill of lading,' such as the one in this case." Pet.App.44a (citation omitted).

The district court further held the parties had contracted out of Carmack under 49 U.S.C. §10709. Pet.App.45a. Because §10709 "specifically

contemplates that the parties to a rail service contract may contractually agree to litigate in a forum other than that provided by the Carmack Amendment," the district court concluded, Plaintiffs' actions must be brought in Tokyo. Pet.App.46a.

2. The United States Court of Appeals for the Ninth Circuit reversed, rejecting UP's contention that Carmack does not apply to inland shipments governed by maritime through bills of lading.

a. The court of appeals recognized the settled law in several other circuits that Carmack *does not* apply to the inland leg of a continuous intermodal shipment from a foreign country under a through ocean bill of lading. Pet.App.17a. "Despite this weight of authority," the court held, "our own precedent expressly forecloses" that interpretation. *Id.* (citing *Neptune*, 213 F.3d at 1119).

b. The court of appeals next considered whether the "the parties' explicit contractual extension of COGSA inland should take precedence" over Carmack. Pet.App.19a.

The Ninth Circuit first acknowledged that "[t]he unanimous Court in *Kirby* ... observed that an inability to extend COGSA's default rules to inland transport, so that entire shipments could be governed by the same liability regime, would defeat 'the apparent purpose of COGSA[] to facilitate efficient contracting ... for carriage by sea.'" Pet.App.24a (fourth alteration in original). It further observed that "[i]gnoring a contractual provision incorporating COGSA seems particularly inappropriate where, as here, 'the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations.'" Pet.App.25a (citation omitted). The

Ninth Circuit recognized that the "policies recently endorsed by the Supreme Court [in *Kirby*]—such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers—recommend applying COGSA here." Pet.App.12a. It nevertheless concluded that "*Kirby* does not control," Pet.App.25a, and that contractual extensions of COGSA lack statutory force and must give way to "conflicting law," Pet.App.23a & n.13 (citing 46 U.S.C. §30701 (Notes Secs. 7, 12, 13)).

c. The Ninth Circuit next considered UP's argument that it and "K" Line had contracted out of Carmack under 49 U.S.C. §10709. Pet.App.26a.

The court noted that "the Board has exempted the transportation at issue here," and observed that an exemption does not itself relieve a carrier of its obligations under Carmack. Pet.App.27a-28a (citing 49 U.S.C. §10502(e)). Lamenting the lack of "guidance regarding how to read §10502 and §10709 in tandem," Pet.App.31a, the Ninth Circuit concluded that exempt carriers may not contract out of Carmack through §10709. It reasoned that exempt services are not "'*subject to the jurisdiction of the Board*'" for purposes of §10709, Pet.App.28a-29a (quoting 49 U.S.C. §10709(a)) (emphasis added by court of appeals), even though it had concluded that such transportation *is* subject to the jurisdiction of the Board for purposes of applying Carmack in the first instance. Pet.App.18a (holding that "Carmack's reach is coextensive with the Board's jurisdiction"). Neither the Ninth Circuit nor the shippers have contended that the MITA's terms were deficient in any other respect under §10709.

Adopting the Second Circuit's holding in *Sompo*, the Ninth Circuit held that §10502 "requires carriers

providing *exempt* transportation to offer Carmack protections before they can successfully contract for alternative terms." Pet.App.29a. The Ninth Circuit acknowledged that UP's MITA agreement offered "*K*" *Line* the option to "'select the liability provisions set forth in [Carmack]'" for domestic transportation. Pet.App.33a (quoting the MITA). The Court of Appeals held, however, that UP could not rely on its contract with "K" Line unless "K-Line ... offer[ed] Carmack's protections when contracting with *Plaintiffs*." *Id.* (emphasis added). The court remanded for a determination of whether "K" Line offered Carmack-compliant terms to the shippers in China. Pet.App.35a.

SUMMARY OF ARGUMENT

Only five years ago, this Court considered a case remarkably similar to this one, and held that an inland rail carrier was entitled to rely on the liability terms negotiated by an overseas shipper and an ocean carrier in a maritime through bill of lading. *Kirby*, 543 U.S. at 18. This Court explained that if the terms of an ocean bill of lading for containerized, intermodal transport did not "apply equally to all legs of the journey" then federal maritime policy would be frustrated and "the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." *Id.* at 29. The relevant facts here are not materially distinguishable. Once again the overseas shippers are trying to sue a downstream rail carrier for relief inconsistent with the terms to which they agreed.

The Ninth Circuit's decision rests on the premise that in *Kirby* this Court somehow failed to notice the Carmack Amendment—which has governed the liability of interstate railroads in this country, when it

applies, for more than 100 years. That premise is incorrect. The Carmack Amendment did not apply to the shipment in *Kirby*, and it does not apply here, for at least two sets of reasons.

I. First, the Carmack Amendment has never applied to the inland leg of an import shipment moving under a through bill of lading.

The key to this issue is that the pre-1978 statutory language and precedents control the interpretation of Carmack because the 1978 codification bill states that it was intended to codify the ICA "without substantive changes" and "may not be construed as making a substantive change in the laws replaced." The pre-1978 statute makes clear that outside of purely domestic commerce Carmack applies *only* to shipments "from any point in the United States to a point in an adjacent foreign country"—*i.e.*, exports to Canada and Mexico. 49 U.S.C. §20(11) (1976).

Prior to the Second Circuit's 2006 decision in *Sompo* it was settled law for nearly a century that Carmack's language meant what it said. As late as 1979, a federal district court explained that "[t]he cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979). The Second Circuit reached a contrary conclusion in *Sompo* only because it believed that in *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357 (1920), this Court construed identical "from ... to" language in §1 of the ICA to embrace imports as well as exports. But as the contemporaneous courts understood, the language of §1 and of Carmack *were never* identical, and this

Court's reasoning in *Woodbury* does not apply to the different language Congress used in Carmack.

Even if the *Woodbury* reasoning *were* applicable to Carmack, a holding that "from ... to" also embraces "to ... from" still would not permit a court to ignore the separate limitation that Carmack applies only to shipments involving an "adjacent" foreign country. China is not adjacent to the United States, so there is no plausible reading of the operative language that could embrace the shipment at issue here.

Any remaining interpretive doubt should be resolved by this Court's holding and reasoning in *Kirby*. The efficient conduct of international trade in the era of containerized shipping requires that parties must be able to agree on, and be bound to, consistent terms governing every leg of an intermodal shipment. As this Court made clear in *Kirby*, the parties' freedom to extend the terms of an ocean bill of lading inland is critical to what Congress hoped to achieve in COGSA. An interpretation of Carmack that does not extend to the inland leg of typical ocean shipments therefore best reconciles the body of the law considered as a whole.

II. Even if Carmack does apply to the inland leg of an ocean shipment moving under a through bill of lading, the parties here opted out of it.

This shipment moved under an agreement negotiated between "K" Line and Union Pacific pursuant to 49 U.S.C. §10709, which allows "rail carriers providing transportation subject to the jurisdiction of the Board" and "purchasers of rail services" to agree by contract for "specified services under specified rates and conditions." 49 U.S.C. §10709(a). Parties to such contracts "shall have no duty in connection with services provided under such

contract other than those duties specified by the terms of the contract," the contract "shall not be subject to" the ICA, and its terms "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of" the ICA. 49 U.S.C. §§10709(b), (c). UP and "K" Line voluntarily agreed to specific contractual terms, and those terms "may not be challenged ... in any court" based on alleged requirements stemming from any provision of the ICA.

The Ninth Circuit reached a contrary conclusion because it believed that for exempt traffic any contract nonetheless must comply with §10502(e)—which the Ninth Circuit believed would require UP to search out the original shippers in China to ensure that "K" Line had offered them the option of full Carmack coverage. The Ninth Circuit's reasoning is wrong on several levels.

First, the Ninth Circuit erred by supposing that §10709 is unavailable because exempt traffic is no longer "subject to the jurisdiction of the Board." 49 U.S.C. §10709(a). An exemption under §10502 relieves a rail carrier from the obligation to comply with provisions of the ICA, but it can be partial and it is always revocable. The Board cannot give away its *jurisdiction*. If exempt traffic were not "subject to the jurisdiction of the Board," then Carmack would not apply either. *Compare id.* §11706(a).

Second, the Ninth Circuit also erred by concluding that §10502(e) would be superfluous if §10709 is available in the context of exempt shipping. Section 10502(e) provides that "[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms

for liability and claims which are consistent with [Carmack]," although "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of [Carmack]." *Id.* §10502(e). That proviso states a limit on the legal effect of an STB exemption order. It is not necessary, to give that limitation substance, to read into it an additional limitation on the contractual freedom of the shipping parties that does not appear in the text.

Third, UP's published MITA does offer shipping terms consistent with Carmack. "K" Line, like most shippers, simply elected a cheaper option under which UP assumed more limited liability. That was a sensible decision in light of "K" Line's own limited liability under the bill of lading, the Himalaya clause extending the bill of lading's protections to subcontractors, and "K" Line's right to subcontract for rail services "on any terms whatsoever."

The Ninth Circuit erred by remanding for an investigation as to whether "K" Line made Carmack-compliant rail shipping terms available to its own customers in China. For reasons explained in "K" Line's brief, it is not a rail carrier and has no Carmack obligations of its own. And any obligation that *UP* had was satisfied by the shipping terms it made available to "K" Line. This Court held in *Kirby* that an ocean carrier like "K" Line can negotiate downstream terms for rail shipment and bind the cargo owners, even if those owners have no notice of those terms and have not given the ocean carrier that authority. The fact that the shippers here expressly gave "K" Line the

right to subcontract "on any terms whatsoever" just gilds that lily.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT APPLY TO IMPORT MOVEMENTS ON A THROUGH BILL OF LADING

The Ninth Circuit's decision should be reversed on the threshold ground that the Carmack Amendment simply does not apply to an import shipment from a foreign country (particularly a *non-adjacent* country) moving under a through bill of lading. Except for a handful of recent aberrations, that rule was settled law for nearly a century. It is essential to the sensible and efficient conduct of international trade, and to the important maritime policies this Court recognized in *Kirby*.

A. The Pre-1978 Statutory Language Controls This Case

Prior to the 1978 bill that recodified the ICA and enacted that codification into positive law, for more than 50 years the Carmack Amendment excluded the transportation at issue here. Carmack only covered domestic interstate transportation and transportation "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. §20(11) (1976). As the Second Circuit correctly recognized in *Sompo*, the pre-codification language is controlling. 456 F.3d at 65. To the extent the language used in the 1978 recodification suggests any broader application, that suggestion is a mere drafting error that Congress has instructed the courts to disregard.

Congress could not have been more clear on this point. The 1978 codification bill states that Congress's

intent was to codify the ICA "without substantive changes," and expressly commands that the new codification "may not be construed as making a substantive change in the laws replaced." *See* Pub. L. No. 95-473, §3, 92 Stat. at 1466. That is not mere legislative history, but the text of the bill as enacted by both Houses and signed by the President. This Court has acknowledged that unambiguous mandate, *see Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987), and it controls interpretation of the statute in the same manner that any overarching interpretive instruction or definitional provision would. Congress has instructed, for example, that when construing statutes the courts must assume that the singular includes the plural and the masculine includes the feminine (and vice versa), 1 U.S.C. §1, that snorkeling fins are a "vessel" and rollerskates are a "vehicle," *id.* §§3, 4, and that "marriage" does not include unions recognized as such in several States and the District of Columbia, *id.* §7. If Congress provided that for purposes of CERCLA liability a person is not the "owner" of land purchased after 2005, this Court would honor that instruction.

There is no reason for this Court not to give similar respect to the plain statutory language mandating how the ICA must be interpreted. Codification bills are a useful but non-substantive housekeeping process, *see, e.g.*, 2 U.S.C. §285 *et seq.*, and necessarily receive less careful scrutiny than new legislation. *See* H.R. Rep. No. 95-1395, at 10, *reprinted in* 1978 U.S.C.C.A.N. at 3019 ("Since the purpose of H.R. 10965 is to codify changes in the law without making any substantive change in the law, no oversight findings or recommendations have been made with respect to the

bill."). An interpretive command like this one provides a useful safeguard in case what is, in effect, a scrivener's error goes undetected. The legislative history confirms what the statute says, and makes clear that Congress's *only* real interest in the 1978 bill was in being assured by the Office of Law Revision Counsel that it would not and could not change the law in any respect.[1]

Even when a codification bill does not expressly command that it "may not be construed" as altering prior law, this Court has applied a strong presumption that such bills are not intended to change the substance of the law unless a contrary purpose is "clearly expressed." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); *see also, e.g., Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Finley v. United States*, 490 U.S. 545, 554-55 (1989); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317-18 (1985); *Cass v. United States*, 417 U.S. 72, 81-82 (1974). In *Cass*, for example, this Court refused to give effect to a rounding provision in the codified version of

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[1] *See, e.g.*, H.R. Rep. No. 95-1395, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 3018 ("[T]his bill makes no substantive change in the law."); *id.* (explaining that in "the usual kind of amendatory legislation ... it can be inferred that a change of language is intended to change substance" but that "[i]n a codification statute ... the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged"); *id.* at 3027 ("Should a question ever arise concerning this change, section 3 of the bill would require the legal conclusion that no change in substance was intended"); 124 Cong. Rec. 30,172 (1978) ("H.R. 10965 restates the Interstate Commerce Act and related laws without substantive change ... ."); *id.* at 31,449 ("[T]his bill would make no substantive changes, intentional or unwitting, in substantive law.").

10 U.S.C. §687(a) stating, without limitation, that "[f]or purposes of this subsection ... a part of a year that is six months or more is counted as whole year ...." 417 U.S. at 73 n.1. A literal application of that requirement would have changed the eligibility requirements for readjustment pay for military reservists, from 5 years to 4 years and 6 months of continuous active duty. Noting that the "committee reports accompanying the codification proposal make plain that no change in the eligibility requirements for readjustment pay was intended by the enacted change in phraseology," *id.* at 81, this Court held that the prior version of the statute was controlling. *Id.* at 81-82.

Here we have far better evidence of Congress's wishes than a mere committee report—an explicit instruction in the statute itself. And the new language in Carmack certainly is not clear enough to indicate that Congress intended to override, for that provision alone, its broader interpretive command. In an obvious attempt to streamline the phrasing, the codifiers in 1978 simply replaced the cumbersome "from ... to" language in the original Carmack Amendment with "for transportation under this subtitle," 49 U.S.C. §11707(a)(1) (Supp. II 1979), which in subsequent revisions has now become "for transportation under this part," 49 U.S.C. §11706(a). As "K" Line explains in its brief, the present "under this part" language can be read in a manner consistent with the traditional rule, without any Orwellian feats of construction. Indeed, it would do much less violence to the plain language than the Court was willing to accept in *Cass*. In any event, Congress's command is clear. The present language "may not be construed" as changing the prior law.

B. The Carmack Amendment Has Never Applied To Imports Moving Under A Through Bill Of Lading

The plain language of the pre-1978 Carmack Amendment makes clear that Carmack applies *only* to domestic commerce and exports to adjacent countries. For decades the courts (including this Court) and the ICC understood that language to mean what it said.

Early decisions of the ICC recognized that Carmack does not apply to import movements. Two months after Congress passed the Cummins Amendment, the ICC considered whether Carmack as amended "appl[ies] to export and import shipments to and from foreign countries not adjacent to the United States." *In re Cummins Amendment*, 33 I.C.C. 682, 693 (1915). The ICC determined that "[t]his must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States." *Id.* The ICC reaffirmed that view in *Heated Car Service Regulations*, 50 I.C.C. 620, 623-24 (1918), recognizing that "the so-called Cummins amendment to the act to regulate commerce does not relate to traffic moving from points in an adjacent foreign country to points in the United States." *See also, e.g., Bills of Lading Cases*, 52 I.C.C. 671, 726-29 (1919) (explaining that "the Cummins Amendment did not apply to export and import shipments to and from foreign countries not adjacent to the United States").

This Court's 1920 decision in *Woodbury* is not to the contrary. *Contra Sompo*, 456 F.3d at 66. *Woodbury* interpreted §1 of the ICA, which defined the ICC's regulatory jurisdiction to embrace (among other things) "any common carrier ... engaged in the transportation of passengers or property ... from any place in the United States to an adjacent foreign country." Act of June 18, 1910, ch. 309, §7, 36 Stat. 539, 545. That language focused on *carriers* "engaged in" certain fields of transportation. This Court explained that "[t]he test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation," and emphasized that "[a] carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States." *Woodbury*, 254 U.S. at 359-60. Mrs. Woodbury herself was traveling on a round-trip ticket from Canada. *Id.* at 358.

By contrast, the pre-1978 Carmack language did not impose Carmack obligations on common carriers "engaged in" certain general fields of transportation. It required that "[a]ny common carrier ... receiving property for transportation ... from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss." 49 U.S.C. §20(11) (1976). The "from any point in the United States to a point in an adjacent foreign country" language in Carmack does not describe the carrier's field of operation, but rather the route *and direction* of a particular shipment. Carmack distinguishes, for example, between the obligations of the "receiving"

and "delivering" carriers, which would be reversed if the movement were in the opposite direction.[2] Whereas in *Woodbury* this Court could say that a carrier "engaged in" import shipments is also (at least ordinarily) "engaged in" exports and therefore generally covered by the Act, particular property is either "receive[d] ... for transportation" into the United States or out of it—not both. In other words, unlike the provision construed in *Woodbury*, for the Carmack Amendment the "test of the application of the act" has always been the "direction of the movement"—*not* the "nature of the transportation as determined by the field of the carrier's operation." *Woodbury*, 254 U.S. at 359-60; *see also Reider v. Thompson*, 339 U.S. 113, 117 (1950) (Carmack turns on "where the obligation of the carrier as receiving carrier originated").[3]

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[2] The statute's distinctions among receiving, connecting, and delivering carriers also confirm that downstream carriers transporting property under a through bill of lading already issued by a different carrier (such as a U.S. railroad moving goods under an import through bill) are not required to issue their own, Carmack-governed, bill of lading—even though in a colloquial sense they have "received" property for transportation within the United States. Receipt of property for transportation has a particular meaning under the statute, which embraces *only* the first carrier issuing the bill of lading.

[3] This Court's reference in *Woodbury* to "the Carmack Amendment under which carriers may limit liability by published tariff," 254 U.S. at 359, is not a holding that Carmack's liability provisions applied to the movement in question. The case this Court cited, *Boston & Maine Railroad v. Hooker*, 233 U.S. 97 (1914), actually explains that a carrier's ability to limit liability for baggage by published tariff derives from *§6* of the ICA, not from Carmack (then §20(11)), and thus exists whether Carmack applies or not. This Court was merely referring to the baggage provisions

The statutory scope of §1 had always been broader than that of Carmack. As originally enacted, Carmack applied only to transportation of property "from a point in one State to a point in another State," even though the ICC's jurisdiction at the same time also embraced carriers engaged in transportation of property *or passengers* to, from, and within territories, "from any place in the United States to an adjacent foreign country," and "from any place in the United States through a foreign country to any other place in the United States," as well as shipments of property "from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." *Compare* ch. 3591, §7, 34 Stat. at 595 *with id.* §1, 34 Stat. at 584. In other words, §1 of the Act always embraced the inland leg of foreign shipments, but Carmack did not. The Cummins Amendment in 1915 broadened Carmack to include shipments involving territories and the District of Columbia, and shipments

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of the 1915 and 1916 Cummins amendments, which made clear that even if Carmack did apply a liability limitation for passenger baggage would still be enforceable. The question of Carmack's scope was thus irrelevant to the issues in *Woodbury*, and both parties agreed with the Texas state court below that Carmack *did not* actually apply to that shipment. *See* Brief of Petitioner at 16, *Woodbury*, 254 U.S. 357 (1920) (No. 1003); Brief of Respondents at 2, *Woodbury*, 254 U.S. 357 (1920) (No. 1003); *see also, e.g., Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 511 (Pa. Super. Ct. 1940) ("The limitation of liability upheld by the Supreme Court [in *Woodbury*] existed independent of the Carmack amendment."). Even the *Sompo* panel conceded that "the *Woodbury* Court interpreted the 'from ... to' language only in that section of the ICA defining the ICC's jurisdiction," *not* "in Carmack." 456 F.3d at 66.

"from any point in the United States to a point in an adjacent foreign country." *See* ch. 176, 38 Stat. at 1197. But it conspicuously *did not* include the language then in §1 embracing the inland legs of foreign transshipments.

Congress confirmed its intent to give §1 a broader scope than Carmack while *Woodbury* was pending. After the Texas appellate court held in *Woodbury* that the ICA did not apply, Congress amended §1 to simplify the language in a manner that still clearly extended to the domestic leg of both import and export movements. *See* Act of Feb. 28, 1920, ch. 91, §400, 41 Stat. 456, 474 (replacing "from ... to" with "from or to ... to or from"). Although Congress revised Carmack at the same time, it *did not* change the language limiting Carmack's application to foreign trade to exports to adjacent countries. *Id.* at 494-95. This Court's subsequent holding in *Woodbury* confirms that the amendment to §1 was unnecessary. But Congress's failure to amend Carmack at the same time is telling.[4]

The influential decision of *Alwine v. Pennsylvania Railroad Co.*, 15 A.2d 507, 508 (Pa. Super. Ct. 1940), later explained that the ICC jurisdictional provision construed in *Woodbury* was "a general provision describing the field which Congress has taken over. It defines the common carriers and forms of

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[4] The *Sompo* panel misunderstood the timing of those amendments, *see* 456 F.3d at 66-67, which caused it to draw the mistaken inference that Congress was reacting to this Court's holding in *Woodbury*—which actually was not rendered until ten months later. But even if *Sompo*'s account of the timing were correct, Congress's action would not support the inference drawn by the *Sompo* court. Congress deliberately changed the wording of the jurisdictional provision, while leaving Carmack unchanged.

transportation about which it proposes to legislate." *Id.* at 512. "That portion of the first section [construed in *Woodbury*] dealt with the space to be occupied rather than the direction in which transportation moved. Consequently, *from* was held to be equivalent to *between*." *Id.* The court then distinguished the language of Carmack, which specifically defines the transportation to which it applies by reference to direction of movement. "Because the same phrase used in a different connection and under different circumstances was ambiguous does not require us to discard the plain meaning of the words employed in [Carmack], where there is no ambiguity." *Id.* The *Alwine* court also pointed to Congress's 1920 amendments to §1 that left the relevant language of Carmack unchanged, and the risk of "extra-territorial legislation" inherent in a broader reading of Carmack, to confirm that Congress meant what it said. *Id.*

Alwine's persuasive reasoning was subsequently adopted by the overwhelming majority of courts to consider the issue in the ensuing decades. *See, e.g., Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachman v. Palmer*, 82 F. Supp. 161 (D. Mass. 1949), *aff'd in relevant part*, 177 F.2d 427 (1st Cir. 1949); *Reider v. Thompson*, 176 F.2d 13 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 113 (1950); *Kenny's Auto Parts*, 478 F. Supp. at 463-64; *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Becker & Co. v. Wabash R.R. Co.*, 55 N.W.2d 776 (Mich. 1952); *Carr v. Erie Lackawanna R.R. Co.*, 85 Misc. 2d 713 (N.Y. Sup. Ct. 1972); *Leary v. Aero Mayflower Transit Co.*, 207 S.E.2d 781 (N.C. Ct. App. 1974); *Whaling v. Atlas Van Lines, Inc.*, 919 F. Supp. 168, 170 (E.D. Pa. 1996). Counsel have been able to identify only one reported

decision inconsistent with that consensus: the New York municipal court's decision in *Goldberg v. Delaware, Lackawanna & W. R.R. Co.*, 40 N.Y.S.2d 44 (N.Y. Mun. Ct. 1943), which was decided only three years after *Alwine*, does not cite any of the mainstream decisions, committed the same error as *Sompo* in misunderstanding this Court's decision in *Woodbury*, and was expressly disapproved in *Strachman* and *Sklaroff*.

The *Alwine* line of decisions recognized that Congress had good reasons to distinguish between the general scope of the ICC's jurisdiction and the specific scope of the Carmack Amendment, which regulates the terms of bills of lading. A through bill of lading for an import shipment is a contract negotiated and executed in another country, governing (at least initially) transportation in that country or on the high seas. The cases reasoned that "it is at least doubtful whether Congress could constitutionally regulate the Canadian carrier's liability for an event ... occurring in Canada in connection with a contract made in Canada by a Canadian corporation ... ." *Strachman*, 82 F. Supp. at 164. Although Congress has regulatory power over a shipment after it crosses into the United States, it is often unclear exactly where damage occurred. Enforcing a presumption (as Carmack would) that damage occurred within Congress's territorial jurisdiction "might raise problems of constitutional delicacy" and in any event "might seem to laymen to be unfair." *Id.*; *see also Alwine*, 15 A.2d at 512 (explaining that the original version of Carmack would have involved "extra-territorial legislation" if applied to import movements). Those observations are valid even if, in the end, this Court would have sustained

Congress's power to regulate more broadly. *See, e.g.*, *Knott v. Botany Mills*, 179 U.S. 69, 74-75 (1900).

This Court twice considered the scope of the Carmack Amendment between *Woodbury* and the 1978 codification. In *Missouri Pacific Railroad Co. v. Porter*, the railroad issued an "export bill of lading in two parts" governing a rail shipment from Arkansas to Georgia followed by ocean transport to Liverpool, England, and which purported to disclaim liability for damage by fire. 273 U.S. 341, 342 (1927). This Court recognized that "the Carmack Amendment, the Cummins Amendment, or §25 does not apply to such a shipment"[5] and that "[n]o Act of Congress or order of the commission prescribed a form of bill of lading for this shipment." *Id.* at 345. This Court nonetheless held that the Arkansas statutes purporting to bar disclaimers of liability were preempted by the ICC's (as-yet unexercised) general authority *under §1 of the Act* to regulate the terms of export bills of lading.

Porter subsequently spawned confusion because the export bill of lading had been issued "in two parts," such that arguably there were separate bills of lading governing the inland and ocean legs. *Id.* at 342. This Court's opinion therefore could have been read to suggest that the inland leg of an export movement to a non-adjacent country is outside the scope of the Carmack Amendment *even if there is no through bill of lading*. The Fifth Circuit drew that conclusion in

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[5] Section 25 was designed to encourage cooperation between U.S. railroads and the U.S. merchant fleet, and imposes particular requirements related to export movements involving a U.S.-flagged ocean vessel. It did not apply in *Porter* because this Court assumed that the shipment involved a foreign-flagged ship. *See* 273 U.S. at 345.

Reider v. Thompson, which considered an import shipment from Buenos Aires to New Orleans, followed by a domestic shipment from New Orleans to Boston under a separate bill of lading issued in New Orleans. 176 F.2d at 14. Citing *Alwine*, the court of appeals held that "the Carmack Amendment does not extend the liability of domestic carriers to cover shipments arising in a foreign country, and intended for through transportation to a point within the United States." *Id.* The Fifth Circuit further held that the separate domestic bill of lading "d[id] not interrupt or affect the continuity and foreign character of the shipment" because the inland "carrier's bill of lading shows on its face that it was issued in furtherance of the original foreign shipment, and that no new, separate, or distinct domestic shipment was intended." *Id.*

This Court granted certiorari and reversed on the second point, emphasizing that "[t]here was no through bill of lading from Buenos Aires to Boston," that "[t]he contract for ocean transportation terminated at New Orleans," and that "[i]f the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not." *Reider*, 339 U.S. at 117. This Court stated that its prior "discussion of the Carmack Amendment [in *Porter*] does not control our decision in this case," because the only issue in *Porter* was whether the Arkansas statutes were preempted. *Id.* at 116 n.1. *Reider* expressly reserved judgment on whether *Alwine* was correctly decided and on whether the Carmack Amendment would have applied if there had been a through bill of lading from Buenos Aires to Boston. *Id.* at 117-18. But this Court's core reasoning in *Reider* strongly supports

Alwine's holding. This Court held that the applicability of Carmack turns upon "where the obligation of the carrier as receiving carrier originated"—in that case, New Orleans, where the "contract for ocean transportation terminated." *Id.* at 117. If the domestic rail carrier in *Reider* had been transporting the goods to Boston under an ocean through bill, it would have been a connecting or delivering carrier—and the obligation of the receiving carrier would have originated in Buenos Aires. *Balt. & Ohio R.R. Co. v. Montgomery & Co.*, 90 S.E. 740 (Ga. Ct. App. 1916), cited with approval by this Court in *Reider* on this very point, 339 U.S. at 117, illustrates the governing law as it was understood at the time.

After *Reider* the lower courts continued to adhere to the *Alwine* rule—often citing this Court's reasoning in *Reider* in support. As the district court explained in *Kenny's Auto Parts* in 1979, "[t]he cases interpreting the Carmack Amendment have uniformly held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." 478 F. Supp. at 464 (collecting cases); *see also, e.g., Condakes*, 281 F. Supp. at 1015 (holding that under *Reider* Carmack did not apply to the domestic leg of an import shipment originating in Mexico and moving under a through bill, and that the U.S. railroad was not the "receiving carrier"). That was the "uniform" state of the law in 1978, when Congress emphasized that its codification made "no substantive change in the law" and that "the precedent value of earlier judicial decisions and other interpretations" remained in force. H.R. Rep. No. 95-1395, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 3018. And despite the differences between the pre- and post-codification text, the courts

that interpreted Carmack between 1978 and 1995 adhered to the settled understanding that Carmack applied to the inland portion of an international multimodal shipment only if a separate domestic bill of lading was issued. *See Swift v. Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992); *Shao v. Link Cargo (Taiwan)*, 986 F.2d 700, 703-04 (4th Cir. 1993).[6] "Congress was aware of ... and, in effect, adopted" that consistent judicial interpretation when it again reenacted Carmack in 1995 without substantive change. *Keene*, 508 U.S. at 212 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

The language chosen by the 1978 codifiers, standing alone, certainly does not demonstrate that Congress harbored a different understanding. As "K"-Line explains, that language can be understood in a manner consistent with the traditional rule. In any event, extracting a contrary rule solely from the 1978 text, in

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[6] As *Sompo* pointed out, *Swift* is a poorly reasoned decision. The Eleventh Circuit stated that the domestic leg of an import shipment "will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading," but appeared to conclude that the absence of a through bill of lading to the final destination was irrelevant on the facts presented because the shipment nonetheless "was intended to be part of a larger shipment originating in a foreign country." *Swift*, 799 F.2d at 701. The Eleventh Circuit's formulation of the test approximates the traditional *Alwine* rule, but in applying that test the court of appeals appears to have committed an error similar to the one this Court reversed in *Reider*. Fortunately, subsequent courts have cited *Swift* for the test it articulated rather than its application of that standard.

opposition to all evidence of what the statute meant before 1978 (including the plain language and settled agency and judicial precedent), would make a mockery of Congress's command that the codification text may not be construed as changing the prior law.[7]

C. Carmack Does Not Apply To *Any* Trade With Non-Adjacent Foreign Countries

Even if *Sompo* were correct that under *Woodbury* "from ... to" always means "from or to ... to or from," the Carmack Amendment *still* would not apply to the vast majority of intermodal shipping on a single through bill of lading (including the shipment in this case) because of the statutory limitation to trade with countries "adjacent" to the United States. The *Sompo* panel acknowledged that limitation, but was compelled to follow prior Second Circuit precedent that it admitted was not well reasoned. 456 F.3d at 68 n.13.

The limitation to shipments involving "adjacent" countries reinforces Congress's obvious desire to exclude maritime shipping, including associated inland rail transport on a single through bill of lading, from the scope of Carmack.

D. Federal Maritime Policy And This Court's Decision In *Kirby* Strongly Support The Traditional Rule

Only five years ago, this Court held that a railroad's

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[7] Justice Stevens suggested *in dissent* in *Keene* that if "Congress intended no substantive change in 1948, that would mean only that the present text is the best evidence of what the law has always meant, and that the language of the prior version cannot be relied upon to support a different reading." 508 U.S. at 221 (Stevens, J., dissenting). This Court was not persuaded.

liability for damage on the inland leg of an import shipment moving under a through bill of lading was governed by the terms of that bill, and that federal maritime policy requires that parties must have the "efficient choice" to elect uniform, consistent, limited liability rules governing both the ocean and inland legs of an intermodal shipment. *Kirby*, 543 U.S. at 26. An ocean carrier "would not enjoy the efficiencies of the default rule" if the terms of the bill of lading "did not apply equally to all legs of the journey for which it undertook responsibility." *Id.* at 29. "And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated." *Id.*

Even if this Court did not implicitly resolve these issues in *Kirby*, the federal maritime policies it articulated should resolve any remaining interpretive doubt. This Court recognized the strong policies, endorsed by Congress in COGSA, favoring the freedom to contract for uniform terms governing an entire intermodal shipment. In the age of containerized intermodal shipping it would be incredibly "inefficient ... [to apply] different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck." *Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 636 (7th Cir. 2003). And even if the Ninth Circuit was correct that a contractual extension of COGSA's default rules does not have the force of law sufficient to displace a contrary statute, Pet.App.26a, the fact that Congress included that option in COGSA at all strongly indicates that Congress believed parties could use it. The Ninth Circuit's view of the world essentially turns that provision into a dead letter. As this Court explained

when interpreting COGSA in *Sky Reefer*, "'[w]hen two statutes are capable of coexistence, ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" 515 U.S. at 533 (citations omitted).

A reading of Carmack that excludes the inland leg of foreign commerce moving under a through bill of lading also is more consistent with the core purposes of Carmack itself. As this Court recognized in *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U.S. 186 (1911), the whole point of the Carmack Amendment was to force the receiving carrier to issue a through bill of lading and accept responsibility (vis-à-vis the shipper) for the entire journey rather than disclaiming responsibility for damage occurring beyond its own lines. This Court explained that a single, clear locus of responsibility under a through bill was essential because the shipper often will be unable to prove where in the journey any damage occurred. *Id.* at 200. In that sense Carmack and COGSA share the same policy objective: to encourage through bills and discourage shipping arrangements under which legal responsibility and the governing law are fractured. Neither statute can achieve that goal if they are interpreted to overlap, covering different legs of the same shipment.

In *Heated Car Service Regulations*, after recognizing that Carmack did not apply to the inland leg of an import shipment, the ICC rejected a proposal that it should exercise its own authority under §1 to regulate the domestic leg of import through shipments from Canada. The ICC reasoned, in part, that such regulation "might result in a difference in the character of the liability of the Canadian and that of the

American lines" and "might also involve the necessity, in order to fix the liability of the respective lines participating in the service, of opening the cars at the border to ascertain the condition of the traffic at that point." 50 I.C.C. at 623. The ICC expressed doubt about whether such arrangement would be "practicable" or "satisfactory either to the carriers or to the shippers." *Id.* Any interpretation of Carmack that would extend to the inland leg of ocean shipments governed by COGSA would have similar undesirable consequences.

The problem with uncertainty about the location of freight damage identified by this Court in *Riverside Mills* and by the ICC in *Heated Car Service Regulations* has only become more acute. Damage often is not even discovered until a sealed container reaches its destination, at which point there may be no way to know whether the damage occurred at sea or over land. In *Reider*, this Court made clear that even when Carmack *does* apply to an inland leg (there, because a separate bill of lading was issued) the inland rail carrier cannot be held liable for damage occurring on the ship. 339 U.S. at 118. In the legal regime contemplated by the Ninth and Second Circuits, therefore, cases involving cargo damage discovered at the destination will be governed *neither* by the parties' maritime contracts nor by Carmack—but instead will require some threshold determination about where the damage occurred. What substantive standards will govern that litigation, when Carmack does not specify any? Where will it occur, when (as here) the contracts between the shipper and the ocean carrier specify an overseas forum for all disputes and the ocean shipper may not even be amenable to suit in the venues

specified by Carmack? Congress obviously did not intend such an unwieldy regime.

II. CARMACK DOES NOT APPLY HERE BECAUSE THE PARTIES HAVE OPTED OUT OF THE ICA

Under 49 U.S.C. §10709, parties to a contract for specified rail services may contractually opt out of the ICA altogether, including the Carmack Amendment. The Ninth Circuit below acknowledged that the direct parties to the rail service contract here (UP and "K" Line) intended to do so. But the Ninth Circuit wrongly believed that for exempt shipments (which currently includes all intermodal shipments) the parties to a shipping contract cannot agree on non-Carmack liability terms unless the actual cargo owner is first offered alternative Carmack-compliant terms. *See* Pet.App.28a-29a. That holding is incorrect on several levels.

A. Section 10709 Is Available To Carriers Providing Exempt Transportation

Congress enacted the Staggers Act in 1980 "to rid railroads of unnecessary and inefficient regulations that impeded the railroads' ability to compete with other modes of transportation." *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Section 208(a) of the Staggers Act added the provision now codified at §10709, and §213 of the Act added subsection (e) to the provisions now codified at §10502. *See* Staggers, §§208(a), 213, 94 Stat. at 1908, 1912-13. Through different mechanisms, §§10709 and 10502 operate to remove rail carriers from the requirements of the ICA.

Under §10709, "rail carriers providing transportation subject to the jurisdiction of the Board under [Part A] may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. §10709(a). Parties to a 10709 contract "shall have *no duty* in connection with services provided under such contract" beyond the terms of their contract, and such contracts "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of [the ICA]." *Id.* §§10709(b), (c)(1) (emphasis added). Section 10709 explicitly permits contracting parties to agree to the venue in which any contract dispute would be litigated. *Id.* §10709(c).

Section 10502 empowers *the STB* to "exempt a person, class of persons, or a transaction or service" from the ICA's requirements. Section 10502 is directed solely at the STB's regulatory exemption power, as demonstrated by its heading—"Authority to exempt rail carrier transportation"—and the plain language of its various subsections. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (explaining that "statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'" (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002))). Subsection 10502(e) limits the STB's exemption power in one crucial respect. An STB exemption order will not alone relieve a rail carrier from Carmack's default liability provisions:

> *No exemption order* issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims

> which are consistent with the provisions of section 11706 of this title [*i.e.*, Carmack].

49 U.S.C. §10502(e) (emphasis added). Although Congress withheld this power from the *STB*, Congress made clear in the next sentence of §10502(e) that this limitation does not affect the ability of the exempt *carrier* to contract out of Carmack:

> *Nothing in this subsection* or section 11706 of this title *shall prevent rail carriers from offering alternative terms* nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

Id. (emphasis added).

Section 10502(e) thus carves out from the STB's power the ability to issue a blanket exemption from Carmack, while preserving the ability of shippers and carriers to modify Carmack's terms by whatever means the ICA permits—including the simultaneously enacted §10709. *See Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) (provisions of the same Act of Congress should be construed *in pari materia*).[8] This lawsuit violates §10709(c)(1)'s command that the terms of a §10709 contract "may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." Respondents' argument, and the Ninth Circuit's

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[8] Conversely, §10709(f) states a limit on the legal effect of a §10709 contract—that the carrier "remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract"—that does not constrain the *STB*'s separate power under §10502(a) to release railroads from common carrier obligations if the Board concludes that those requirements are no longer necessary.

holding, is precisely that the §10709 contract agreed to by UP and "K" Line somehow violates requirements imposed by §10502(e)—which of course is "a provision of this part" within the meaning of §10709(c)(1).

The Ninth Circuit's contrary conclusion is deeply flawed. First, the Ninth Circuit held that §10709 is not available for exempt shipments because such shipments are no longer "transportation subject to the jurisdiction of the Board" within the meaning of §10709(a). That holding rests on the implausible premise that this transportation *is* within the jurisdiction of the Board for purposes of determining whether the Carmack Amendment applies, but is *not* within the jurisdiction of the Board for purposes of §10709, even though the relevant language of the two provisions is identical. Nothing in the text or the history of the provisions suggests that Congress intended such a result.

The text and structure of §10502 demonstrate that a discretionary exemption does not strip the Board of jurisdiction over the exempted transportation. The STB retains the power to revoke an exemption at any time. *See* 49 U.S.C. §10502(d). As the ICC explained, "unless this revocation power is a nullity, the granting of an exemption is not—and cannot be—a permanent abrogation of federal jurisdiction. The potential for total or partial reimposition of regulation is always present." *Consol. Rail Corp.–Declaratory Order–Exemption*, 1 I.C.C.2d 895, 899 (1986). "Granting an exemption on the basis of the statutorily required findings merely affects 'the *application* of a provision of [the ICA].' Facially, the statute does not empower the ICC to remove any matter from its statutory jurisdiction." *Id.* at 898 (citation omitted) (alteration in

original). As this Court reminded UP earlier this very Term, an agency never has the power to give away "jurisdiction" that Congress conferred. *See Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, No. 08-604, slip op. at 2 (Dec. 8, 2009).

The Ninth Circuit also erred in concluding that §10502(e) is meaningless if §10709 is available in the context of exempt carriage. Section 10502(e) states a limit on the legal effect of an STB exemption order. It is not necessary, to give that limitation substance, to read into it an additional limitation on the contractual freedom of the shipping parties that does not appear in the text. *See* 49 C.F.R. §1090.2 ("The exemption does not ... operate to relieve any carrier of any obligation *it would otherwise have, absent the exemption*, with respect to providing contractual terms for liability and claims.") (emphasis added).

The United States has recognized that exempt transportation may contract out of the ICA through §10709. In its Invitation Brief urging the Court to grant certiorari in *Kirby*, the United States (joined by the STB) stressed that "the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules." Brief for United States as Amicus Curiae at 12, *Kirby*, 543 U.S. 14 (2004) (No. 02-1028) ("U.S. *Kirby* Invitation Brief"). The United States was well aware that the rail carrier in *Kirby*, as in this case, was providing exempt transportation under 49 C.F.R. §1090.2. *Id.* at 11 n.4. It even explained that "data maintained by the Surface Transportation Board reflect that most (approximately 56% by revenue) multimodal, containerized rail freight is transported under such contract-carriage

arrangements, to which the Carmack Amendment's liability regime does not apply." *Id.* at 12.

B. UP Provided Carmack-Compliant Alternative Terms To "K" Line

Regardless, any requirement imposed by §10502(e) was amply satisfied here. The Ninth Circuit believed that §10502(e) required "K" Line to make an explicit offer of Carmack-compliant rail shipping terms to the shippers in China before anyone could agree to non-Carmack terms, and that factual uncertainty about whether such an offer had been made requires a remand. Pet.App.33a. But what "K" Line offered or did not offer to the shippers in China is irrelevant, as a matter of law. For reasons explained in "K" Line's brief, it is not a "rail carrier" and has no Carmack obligations of its own. And any obligations *UP* had were satisfied by the terms it made available to "K" Line.

UP explained in its petition for certiorari, and the brief in opposition did not contest, that "K" Line had the practical option to re-bill this shipment as domestic and elect Carmack terms (and rates). *See* Pet. 32; Pet.App.33a; "K"-Line Br. at 12; S. Ct. R. 15.2. UP's MITA is a published circular outlining the terms on which UP is willing to contract for exempt intermodal rail carriage. *See* JA-123 (cover page of MITA, formerly known as "UP Exempt Circular 20-B," which provides "[t]erms and conditions for the transportation of deregulated Intermodal Shipments"). Those terms are then implemented through ERTA contracts with particular shippers. As the Ninth Circuit recognized, the MITA specifically provides that "'[o]n domestic shipments that originate in the United States, Shippers may, at their option, select the liability provisions set

forth in [Carmack]'" if they are willing to pay a significantly higher freight rate. Pet.App.33a (quoting MITA) (first alteration in original). Like the shipper in *Reider*, "K" Line could have written its ocean bill of lading such that "the foreign portion of the journey terminated at the border of the United States," 339 U.S. at 117, and contracted with UP for a separate shipment with its own bill of lading originating in the United States. *See* JA-134-35 (MITA 7.7.B (providing that "International Shipments" that are "warehoused, processed, repackaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments")).[9] It simply chose not to, because it was authorized to subcontract for rail carriage "on any terms whatsoever." The shippers gave "K" Line that right because (as this Court recognized in *Kirby*) it is more efficient to buy insurance from an insurance company than from a railroad. 543 U.S. at 19-21.

An open invitation for contracting on Carmack-compliant terms, like UP's MITA, satisfies any

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[9] UP's freight rates on international through shipments are significantly lower than the comparable domestic rates. UP therefore makes an effort to ensure that true domestic movements are not passed off as the inland leg of an international through shipment. *Cf.* JA-134-35 (MITA 7.7.B.2 (providing that "international rates given to ocean carriers apply on international traffic moving on their Ocean Bill of Lading and in their specific owned or leased Containers. Any other traffic cannot be moved under these rates")). As the certiorari petition explained (at 32), UP would be perfectly happy to accept the rebilling of an international shipment into separate ocean and domestic legs, as occurred in *Reider*. *See* JA-135 (MITA 7.7.B.3)). As a practical matter, that almost never occurs—because the international through rates are lower.

obligation that §10502(e) might impose.[10] It would make no sense to require carriers to open every negotiation with a further ritualized statement reminding the shipper that Carmack-compliant terms would be available—particularly when almost no shipper is actually interested in such terms. Under the old common law, this Court recognized that an agreement for limited liability did not require that the parties actually discuss the alternative common law rule. *See Cau v. Tex. & Pac. R.R. Co.*, 194 U.S. 427, 430 (1904). Section 10502(e), which was enacted in the context of a broad deregulation of the rail industry, surely was not intended to require contracting parties to engage in a Kabuki dance before agreeing to the terms they want.

This Court held in *Kirby* that a railroad is entitled to treat its direct counterparty as the shipper, and not look behind whether that counterparty is the original cargo owner or instead a shipping intermediary. Intermediaries can bind shippers to terms with downstream carriers—even if, unlike here, the intermediary lacks contractual authority to do so.

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[10] The Ninth Circuit was confused about the relationship between the MITA, the ERTA, and the bill of lading, and wrongly saw a "factual morass" requiring a remand. Pet.App.34a n.22. For present purposes all that matters is that the MITA makes clear to the world that UP provides contractual terms consistent with Carmack that shippers may select. The interaction between the various contracts actually signed here is irrelevant, but not particularly complex. The rights between UP and "K" Line are defined by the ERTA. The shippers' rights against "K" Line are defined by the bill of lading. In an action by the shippers against UP, UP is entitled to the benefit of any limitations in the bill of lading (per the Himalaya Clause) *and* any limitations to which "K" Line agreed in the ERTA (per *Kirby*).

"When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." 543 U.S. at 33. Relying on *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 514 (1914), this Court held that a "'carrier ha[s] the right to assume that [the intermediary] could agree upon the terms of the shipment,'" *id.* at 34 (second alteration in original), and "could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party," *id.* at 33. This Court explained that "[i]n intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner," and a rule requiring carriers to "seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection," would be wholly unworkable. *Id.* at 34-35. The necessary "information gathering might be very costly or even impossible," and carriers would want to charge shipping intermediaries higher rates, "interfer[ing] with statutory and decisional law promoting nondiscrimination in common carriage." *Id.* at 35. *Kirby*'s holding "produces an equitable result" because the cargo owner can always sue the party with which it initially contracted. *Id.*; *see also* Brief for United States as Amicus Curiae Supporting Petitioners at 29-30, *Kirby* (merits) (arguing that allowing the intermediary to bind the cargo owner to terms of shipment permits "the underlying carrier [to] base its rates on an accurate understanding of its potential exposure to suit, without discriminating among shippers in a manner that federal law forbids").

Against that backdrop, UP was entitled to treat "K" Line as the shipper for purposes of any requirements imposed by §10502(e) and Carmack. In a modern shipping contract with an ocean carrier like "K" Line, a railroad agrees to transport containers that were sealed on the other side of the world and may contain goods aggregated for efficiency by intermediaries from many different cargo owners. The railroad may have no idea who the ultimate shippers were, and no practical way to locate them. *See* U.S. *Kirby* Invitation Brief at 14 ("Nor is it feasible for subcontracting carriers to negotiate directly with cargo owners."). A rule that the railroad must contact such parties before it can agree to binding terms with the intermediary would, as this Court recognized in *Kirby*, be completely impractical and inconsistent with the railroad's obligation to deal with intermediaries on the same terms as cargo owners. And it would frustrate the efficiency of intermodal trade by making impossible for shippers to sign an effective, single contract for "door to door" shipment.

The brief in opposition suggested that railroads could protect themselves by extracting a promise from the ocean carrier that a Carmack-compliant option was offered to the cargo owner—or by insisting on an indemnity from the ocean carrier against any liability imposed under Carmack. Opp. 13. The purpose of Congress's expansive deregulation of rail transport has been to free railroads from complex administrative burdens and to permit sophisticated parties to rely on their contracts. An after-the-fact cause of action against the ocean carrier, which may or may not be solvent and subject to meaningful judicial relief in the U.S. courts, is no substitute for the railroad's right to

know in advance what the legal rights and responsibilities governing a particular shipment will be. *See* U.S. *Kirby* Invitation Brief at 14-15 (recognizing that "[i]ndemnity agreements also are not a satisfactory mechanism for providing certainty to subcontracting carriers"). UP cannot take the risk that it might be exposed to potentially enormous liability for damage to sealed, containerized cargo with such slender protection. At a minimum, the railroad will be incentivized to expend resources on wasteful and inefficient investigations, and to discriminate against intermediaries in favor of direct dealings with cargo owners—all in conflict with the policies discussed in *Kirby*.

The contractual relationships among the parties in this case (which are typical of modern international trade) just confirm the wisdom of allowing railroads to deal directly with intermediaries. The shippers here agreed to maritime bills of lading that expressly applied to inland carriage through a Himalaya clause and authorized the ocean carrier to subcontract for rail services "*on any terms whatsoever*." They made an efficient choice to contract with "K" Line for through transportation, rather than arranging for rail transportation directly. The shippers' recourse against "K" Line, and any subcontracting carrier, for damage to the cargo is explicitly limited by the terms of that bill—and the shippers obtained separate insurance to protect themselves from loss. That common arrangement reflects the obvious reality that shippers are in a far better position than carriers to insure against the risks of damage to sealed, containerized cargo. If the shippers had wanted a bill of lading with different terms (such as a requirement that "K" Line

choose Carmack-compliant rail carriage in the United States) the shippers could have negotiated for such terms, presumably at a higher cost.

After opting for the convenience and efficiency of one-stop shopping, and a price reflecting "K" Line's right to arrange rail transport "on any terms whatsoever," Plaintiffs and their insurers now seek to avoid the bargain they struck. But as this Court recognized 125 years ago, "it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." *Hart v. Pa. R.R. Co.*, 112 U.S. 331, 341 (1884).

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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